SUPREME COURT, U. S.
FEB 7 1974
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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1212

JAMES M. DE ANGELIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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James M. DeAngelis prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered on January 15, 1974, which affirmed a judgment of conviction previously entered against the petitioner in the United States District Court for the Eastern District of New York.

Opinion Below

The Court of Appeals affirmed in an opinion dated January 15, 1974, *United States* v. *DeAngelis*, — F.2d —. The opinion of the Court of Appeals is reproduced as Appendix A hereto, *infra* * (1a *et seq*).**

* The opinion of the Court of Appeals was unanimous; however, Circuit Judge Mansfield filed a concurring opinion in which the other two Judges of the Circuit Court panel also concurred (12a).

** In this petition, "—a" is a reference to the opinion of the Court of Appeals as reproduced in the appendix to this petition.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was filed on January 15, 1974.

Constitutional and Statutory Provisions Involved

This case involves the Due Process Clause of the Fifth Amendment and the Compulsory Process Clause of the Sixth Amendment to the United States Constitution, which are as follows:

Fifth Amendment

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . . ."

Sixth Amendment

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ."

Questions Presented for Review

1. Was the petitioner deprived of a fair trial by the prosecutor's unsupported charges in summation that, by the threat of physical harm, the petitioner had coerced a defense witness to perjure himself?

2. Was the petitioner deprived of a fair trial and of his right to compulsory process by the failure of the government to produce or locate an undercover informant who had, concededly, instigated the transactions alleged in the indictment, and who the defense sought for the purpose of impeaching the credibility of the government's only alleged eyewitness?

Statement of the Case

The indictment herein charged petitioner and one Joseph Matranga with four violations of the Federal narcotics laws. Counts 1 and 2, respectively, charged that on April 13, 1972, the defendants possessed one ounce of cocaine hydrochloride with intent to distribute the same [21 U.S.C. § 841(a)(1)], and did in fact distribute it [21 U.S.C. § 841 (a)(1)]. Counts 3 and 4, respectively, charged that on May 12, 1972, the defendants committed similar violations with respect to one-eighth of a kilogram of cocaine hydrochloride.

Prior to trial, the co-defendant Matranga entered a plea of guilty to the indictment (A. 1),* and petitioner stood trial alone.

After a five day trial, the jury rendered a verdict of guilty against the petitioner as to each of the four counts. On July 27, 1973, petitioner was sentenced to a term of imprisonment for a period of five years on each count, to run concurrently, and to be followed by a special parole term of seven years (A. 1, 487).

A. Summary of the Government's Proof **

The government's case was completely dependent upon the testimony of Ronald Jordison, an undercover agent of the Federal Bureau of Narcotics and Dangerous Drugs. Jordison testified that, through the services of an undercover informant (Marilyn Masick), he was introduced to Joseph Matranga on April 12, 1972 (A. 46-57).

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*References preceded by "A.—" are to the Appellant's appendix in the Court of Appeals.

** The substance of the trial proof is set forth in the opinion of the Court of Appeals. This statement of the case will recite only so much of the District Court proceedings as is relevant to a consideration of the issues presented by this petition.

According to Jordison, he purchased an ounce of cocaine from Matranga on April 13, 1972 (A. 58-60), and thereafter purchased an eighth of a kilo of cocaine from Matranga on May 12, 1972 (A. 28-34). Both sales were consummated in Matranga's Brooklyn apartment. On both occasions, petitioner allegedly arrived at the apartment shortly after Jordison, and, according to Jordison, petitioner's words and actions clearly indicated that he was delivering the cocaine to Matranga who immediately thereafter sold it to Jordison.

B. Summary of the Defense Proof

Prior to trial, Matranga entered a plea of guilty to the indictment. He testified at trial as a defense witness. While he admitted both sales, he denied that the petitioner had been his source or that the petitioner was even aware of his (Matranga's) cocaine dealings. According to Matranga, petitioner's visit to the apartment on April 13, 1972 was innocent and unexpected (A. 207-212). Moreover, Matranga contended that petitioner was not even at his apartment on May 12, 1972, the date of the second transaction.

Miss Zohira Torres, a graduate child psychologist, testified that she and a girlfriend arrived at Matranga's apartment on April 13, 1972, and Matranga introduced them to Jordison who was already there (A. 275-276). While Matranga and Jordison were having a private conversation in another room, petitioner arrived stating that he was looking for his girlfriend. At no time during the course of petitioner's stay at the apartment did petitioner leave the presence of the two girls, nor did he make any of the statements attributed to him by Agent Jordison (A. 276-278).

Petitioner testified in his own behalf. He denied any knowledge of or participation in the cocaine transactions. His sole purpose in visiting Matranga's apartment on April

13, 1972 was to find his girlfriend, who occasionally did housekeeping work for Matranga (A. 326-331; see also testimony of Linda Lentini, A. 286, *et seq.*). With regard to May 12, 1972, the date of the second transaction, petitioner testified that he could not have been at Matranga's apartment since, on that morning, he and three of his friends traveled to a summer home which they had leased on the eastern end of Long Island. He remained there for the entire weekend (A. 332-336). He was supported in this contention by the testimony of two of those friends, Anthony Palumbo (A. 292 *et seq.*), and Arthur Gerard Doran (A. 305, *et seq.*), both of whom were shown to be reputable individuals.

Although Agent Jordison did not claim to have seen petitioner produce the ounce of cocaine which was the subject of the first sale, he did claim that, on the date of the second sale, he saw petitioner bring into the apartment the eighth of a kilo of cocaine which was the subject of the second sale. On cross-examination of Jordison, the defense sought to weaken this latter contention by eliciting from Jordison the fact that on the evening prior to the second sale, in the absence of petitioner, Matranga had displayed an eighth of a kilo to Jordison in the apartment and the sale was delayed to the following day because Jordison did not have sufficient funds (A. 87-92). Indeed, Matranga testified to the same effect and asserted that the eighth of a kilo displayed to Jordison on the evening of May 11, 1972 was the same eighth of a kilo that was sold to Jordison on May 12, 1972.

C. The Government's Rebuttal

In response to the petitioner's alibi evidence that he was not at Matranga's apartment on May 12, 1972, three government agents testified that they saw petitioner enter Matranga's apartment building at about the time of the transaction on the afternoon of that date (A. 179-180, 382, 413).

D. The Alleged Threats

Matranga testified that his source of supply for the cocaine had been two individuals of Spanish or Puerto Rican descent, who he knew as "Carlos and Jimmy." He did not know where these persons resided. Until the arrests in this case, they could usually be found at certain hangouts in Coney Island (A. 47-48, 202, 249-252).

Under cross-examination by the prosecutor, Matranga testified that, following his arrest, he had agreed with agents of the Bureau of Narcotics and Dangerous Drugs to set up another transaction with his source of supply. The transaction never occurred (A. 238).

The cross-examination continued as follows:

> "Q. Isn't it true that you thereafter contacted agents of the Bureau of Narcotics and Dangerous Drugs to advise them that you would not cooperate? A. Not in those words.
>
> "Q. Isn't it true that you told Mr. Jordison of the Bureau of Narcotics and Dangerous Drugs that you could not cooperate? A. Yes.
>
> "Q. And isn't it true that the reason for that was that you told Agent Jordison your life had been threatened? A. Yes.
>
> "Q. And isn't it true that you told him that it had been threatened by the defendant? A. No" (A. 238-239).

Later in his cross-examination, the prosecutor continued:

> "Q. Now, after you were arrested, I believe you testified yesterday that you agreed to cooperate with the Bureau of Narcotics and Dangerous Drugs? A. Yes.
>
> "Q. In introducing them to your source of cocaine? A. Yes.

"Q. Subsequent to that agreement you contacted Agent Jordison and advised him that you could not cooperate, is that correct? A. Yes.

"Q. And the reason for that was that you had been threatened?

"The Court: Didn't we cover this yesterday?

"[Prosecutor]: We began to. I am going to develop it a little more.

"The Court: All right.

"Q. Isn't it true that your children were also threatened? A. I never mentioned my children.

"Q. And isn't it true that they were threatened by the defendant, James DeAngelis? A. No, it is not.

"[Defense counsel]: Your Honor, may I ask at this time if you could tell the jury that the questions are not evidence?

"The Court: That's right. I tell that quite frequently.

"Now members of the jury, I have mentioned that you can decide a case only from the evidence coming from the witness stand. The fact that a question is asked does not imply anything with respect to the answer and you have heard the witness' answer and you are not to assume anything from the question that was asked" (A. 262-264).

The prosecution made no effort to prove any prior inconsistent statements on the part of Matranga by independent evidence. Nevertheless, in his summation to the jury, the prosecutor argued as follows:

"And then, ladies and gentlemen, Agent Jordison gets a call and Matranga says he can't cooperate because he has been threatened. Now ladies and gentlemen, it is true he was threatened and ladies and gentlemen it is true he was threatened by his source and ladies and gentlemen it is true he was threatened by his source Jimmy but now he comes in here and testi-

fies that it was a different Jimmy. Ask yourself why would a man who has plead guilty to the whole thing, why would he do it? Why? Why would he come in and testify for this man? *Ladies and gentlemen, he was threatened by this man James DeAngelis.* Now, Mr. Light said the narcotic business is a dog eat dog world. People get killed and that is true. Matranga was threatened, *threatened by this man because this man was afraid Matranga would give him up.*

"But then remember, people get killed in this business says Mr. Light. What happens? Matranga comes in and testifies. Why does he come in and testify? Matranga is down the drain. Why does he come in and testify? *He testifies because he has been threatened and told to come in here and testify for this man, James DeAngelis*" (A. 440-441). [Emphasis Added]

E. The Missing Witness

The testimony of Matranga and Agent Jordison with regard to their dealings prior to the April 13, 1972, sale differed in several respects.

At the outset of his cross-examination, Jordison could not recall when or under what circumstances he first met Matranga (A. 46-48). After checking his notes, he reconstructed events as follows: his introduction to Matranga was through an informant by the name of Marilyn Masick (A. 53). He had known Marilyn only "a very short time" before the introduction (A. 53-54). On April 4, 1972, arrangements were made to meet Matranga on April 5, 1972; however, that meeting "fell through" (A. 49). The meeting was then set for April 12, 1972 (A. 49). On April 12, 1972, with Marilyn present, Jordison met Matranga, and Matranga promised to try to get some cocaine for the following day (A. 50-57).

Matranga's testimony, on the other hand, was that Marilyn Masick brought Jordison to him for the first time in September, *1971*, and that Jordison thereafter hounded him to locate a source of cocaine. Matranga eventually did so, and the first such sale consisted of an ounce of cocaine prior to April, 1972 (A. 199-202). Thus, the April and May sales were, respectively, the second and third sales which he had made to Jordison (A. 202-203).

As the testimony of both men indicates, the only other source of information to which the parties could turn for confirmation of the duration and nature of the relationship between Shorty and Matranga was the informant Marilyn. If she disputed Jordison's version of events, his credibility might well have been sufficiently impaired to warrant the jury to reject his inculpation of petitioner.

Defense efforts to ascertain the whereabouts of the paid informant, Marilyn, came to naught. When the defense requested that the prosecution produce her or provide her address (A. 172-173), the prosecutor responded:

> "[Prosecutor]: As to the individual Marilyn Masec, she has been deactivated for at least six months. We have no idea where she is.
>
> [The Court]: Have you a last address?
>
> "[Prosecutor]: That would be the address that Mr. Light [defense counsel] had, 85 or 86th Street, just off Central Park West, and that is the last address we have on her.
>
> "[The Court]: Are there any places that Mr. Jordison or anyone else knows to look for her?
>
> [Prosecutor]: Not that I know of" (A. 174).

Defense counsel pressed his demand for the informant:

> [Defense counsel]: I would like to put on the record—because I am not happy with the explanation of Marilyn Masec—she was a government in-

formant, registered informant, made the introductions in this case. There is a direct contradiction in this case of when the undercover agent met Joseph Matranga. According to the testimony it was a year before and I think it is important and for the government to say she was deactivated six months ago—they should make more of an effort, her social security number, associations, relatives.

"From their point of view, if Marilyn could be called to say that on April 12, 1972, she introduced Shorty to Matranga, then it contradicts Matranga and I think there is a little more of a burden when we have a registered informant than just to say she was deactified.

"John Kroll gave us information that she was alive in Colorado somewhere; that she was an informant and the government moved her.

"The Court: Bring him in.

"Mr. Light: Or bring Marilyn in. It is simple.

"The Court: Well we will resume the trial" (A. 257-258).

REASONS FOR GRANTING THE WRIT

I.

Petitioner was deprived of a fair trial by the prosecutor's unsupported contention in summation that a witness had given testimony favorable to the defense because of threats made by the petitioner.

We have set forth *supra*, at pp. 6-7, that portion of the prosecutor's cross-examination of the key defense witness Matranga, in which the prosecutor sought to show that petitioner had threatened Matranga and his family with bodily harm in order to persuade Matranga to exculpate the petitioner. Matranga categorically denied that the petitioner had made any such threats, and denied that he had ever told anyone that petitioner had made such threats. The prosecution made no effort to prove any prior inconsistent statements on the part of Matranga, but nevertheless, the prosecutor argued in summation,*

> "* * * Ladies and gentlemen, he was threatened by this man, Jimmy DeAngelis. * * * Matranga was threatened, threatened by this man, because this man was afraid Matranga would give him up. * * * Why does he come in and testify? He testifies because he has been threatened and told to come in here and testify for this man, Jimmy DeAngelis" (A. 440-441).

As noted in the opinion of the Court of Appeals, Matranga's testimony was only "that he had been threatened not by 'Jimmy' DeAngelis, but by his alleged source in Coney Island, the 'Jimmy' of 'Jimmy' and 'Carlos'" (6a).

* This portion of the prosecutor's summation is reproduced in full, *supra*, at pp. 7-8.

The Court of Appeals, however, found the prosecutor's accusations against the petitioner permissible under the following rationale:

> "Here Matranga had admitted his guilt. He admitted that he and his family had been threatened. And he admitted that the threat came from his source 'Jimmy.' The prosecutor's summation did no more than recapitulate the witness' own testimony and argue why it was not to be believed. We do not think that his further urging the jury to draw the inference that the source known as 'Jimmy' and the appellant were one and the same was improper. It is the accepted and proper purpose of summation to make such arguments regarding the purpose and credibility of any witness so long as there is sufficient support therefor in the record before the jury. As we find such support here, we conclude that the summation was well within permissible limits" (7a-8a).

Petitioner respectfully urges that, in the absence of any evidence that petitioner had threatened Matranga, it was clear error for the prosecutor to so argue in summation. Indeed, in the absence of any evidence, the prosecutor was compelled to rely upon the assertion of his own personal opinion, thus compounding the error.

In *Berger* v. *United States,* 295 U.S. 78 (1935), this Court reversed a criminal conviction and severely criticized a prosecutor for arguments similar to that in the instant case. The following excerpt from this Court's opinion in *Berger* demonstrates the similarity:

> "The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury. A reading of the entire argument is necessary to an appreciation of these objectionable features. The following is an illustration: A witness

by the name of Goldie Goldstein had been called by the prosecution to identify the petitioner. She apparently had difficulty in doing so. The prosecuting attorney in the course of his argument, said (italics added):

'Mrs. Goldie Goldstein takes the stand. She says she knows Jones, *and you can bet your bottom dollar she knew Berger.* She stood right where I am now and looked at him and was afraid to go over there, and when I waved my arm, everybody started to holler, 'don't point at him.' You know the rules of law. Well it is the most complicated game in the world. I was examining *a woman that I knew knew Berger and could identify him,* and she was standing right here looking at him, and I couldn't say, 'isn't that the man?' Now imagine that! But that is the rules of the game, and I have to play within those rules.'

"The jury was thus invited to conclude that the witness Goldstein knew Berger well but pretended otherwise; and that this was within the personal knowledge of the prosecuting attorney." (295 U.S. at 85-88).

Here, as in *Berger,* the prosecutor branded the witness a liar and charged that the witness had lied out of fear of the defendant. Particularly in view of the *questions* which had been asked of the witness by the prosecutor during cross-examination, the jury could only conclude that the prosecutor's assertions of personal knowledge came from some source which had not been the subject of evidence at trial.

The issues of threats had been introduced into the trial by the prosecutor in cross-examination of Matranga; Matranga had denied that the petitioner had ever threatened him in any way and asserted that the petitioner had not participated with him in the crimes charged.

Those who are familiar with the trials of criminal cases realize that, regardless of all the presumptions and safeguards afforded to a defendant, he is nevertheless in a most difficult and unenviable position no matter what the merits of the prosecution's case may be. His plight is compounded, in the present climate, when the charge against him is that of trafficking in narcotics and his accuser is an undercover Federal agent. The present case departed somewhat from the normal run of such prosecutions. Aside from his own testimony, the petitioner was able to place before the jury the favorable testimony of an admitted participant in the crime, as well as the testimony of three upstanding citizens. Every aspect of the government's case was squarely contradicted. Under circumstances such as these, we respectfully submit that the prosecutor's argument in summation that the petitioner had suborned perjury and had threatened bodily injury, may well have shifted the balance with regard to the jury's verdict. Such tactics should not be countenanced in a federal court, and are specifically condemned by the *American Bar Association's Standards Relating to the Prosecution Function*, § 5.8 and by the *A.B.A. Code of Professional Responsibility* (1971), D.R. 7-106(c)(3),(4).

II.

Petitioner was deprived of due process of law and of his right to secure the attendance of witnesses by the failure of the Government to produce or locate the paid informant Marilyn Masick.

As shown *supra*, at pp. 8-11, it was through the paid and registered informant, Marilyn Masick, that Agent Jordison made his connection with Matranga and made his arrangements for the first cocaine purchase. In their testimony, Jordison and Matranga differed sharply as to the duration of their relationship, and the number of sales which had been consummated. If Matranga was testifying truthfully, then Jordison made a purchase which he did

not report to his superiors, and their relationship had existed for many months prior to the first sale alleged in the indictment. Only Marilyn Masick was in a position to resolve the dispute.* If Marilyn Masick had been produced by the government, and if she would have corroborated the version of events detailed by Matranga, it would have established that Agent Jordison's testimony had so gravely departed from the facts that he should not be believed with regard to his accusations against the petitioner.

The trial in this case commenced on June 7, 1973 (A. 4). Counsel for the government alleged that the missing witness was "deactivated" some six months prior to trial (A. 257). That would mean that she was "deactivated" at or about the time of the arrests and indictment in this case.

Miss Masick was certainly an intricate part of the initial transaction since, according to Jordison, she had introduced him to Matranga and was present when the first bargain was made on the day prior to the transfer of the cocaine. It is petitioner's submission that when the government engages a registered and paid informant to create a narcotics transaction, then the government has the minimal responsibility of making some effort to keep track of that informant for possible use at trial. The government did not claim to have made any such effort,

* In its opinion, the Court of Appeals indicates that another individual by the name of John Kroll, Miss Masick's boyfriend, was available to the defense and would have served the same purpose (12a). In fact, the testimony is to the contrary. Matranga had first met Marilyn Masick and John Kroll together (A. 196-197); however, substantially prior to Matranga's introduction to Agent Jordison, Kroll had left the scene and "gone to sea" (A. 197-201). It was not contended by Jordison or by Matranga that Kroll was in any way involved in the relationship between Jordison and Matranga.

and the statements of government counsel at trial do not indicate that any meaningful effort was made to locate her.*

Petitioner respectfully submits that the Court of Appeals should have remanded the case to the District Court for a full hearing to determine: 1) whether the government was at all responsible for, or otherwise encouraged, the disappearance of Marilyn Masick; 2) whether the government, by the reasonable exercise of the resources available to it, could have produced the missing informant at trial; and 3) whether the testimony of the missing informant, if she can be located or if other records in the government's possession so indicate, would have been favorable to the defense.

In *Roviaro* v. *United States*, 353 U.S. 53 (1957), this Court held that the rule protecting the identity of police operatives from disclosure, i.e., the informant's privilege, must give way to "the fundamental requirements of fairness" (353 U.S. at 60). More specifically, *Roviaro* held:

> "* * * Where the disclosure of an informant's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause,

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* The Court of Appeals notes in its opinion that ". . . the only indication of the informant's possible testimony, an unsigned statement made to narcotics agents, suggests that her testimony would have corroborated the government's case" (12a). The government's production of the statement in question amply demonstrates the lack of effort expended by the government. The statement was *not* produced at trial, nor did the government indicate to the trial court that any such statement existed. The first reference ever made to Marilyn Masick's alleged statement was in the government's brief to the Court of Appeals on the appeal of this case. A xerox copy of the alleged statement was annexed to the government's appellate brief as an appendix, and it was explained that the government did not previously realize it had such a statement in its possession.

> the privilege must give way. In these situations, the trial Court must require disclosure and, if the government withholds the information, dismiss the action. * * *" (353 U.S. at 60-61).

See also: *Branzburg* v. *Hayes,* 408 U.S. 665 (1972), at 98.

Of course, the identity of the informant in the instant case was revealed at trial and, therefore, the privilege was inapplicable, *Roviaro* v. *United States, supra,* 353 U.S. at 60. The principle of *Roviaro*, is, therefore, all the more applicable. That principle is that the defense should not be barred from access to information which "is relevant and helpful" or which "is essential to a fair determination." See also *Brady* v. *Maryland,* 373 U.S. 83 (1963). Since the record in this case does not indicate that the government made any meaningful effort to maintain contact with the informant or to locate her when the issue arose at trial, the relief outlined *supra*, at p. 16, should be granted. Otherwise, the Sixth Amendment guarantee that "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .", will have been rendered inoperative to petitioner.

CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should be granted; the judgment of conviction should be reversed, and a new trial should be ordered; in the alternative, the case should be remanded to the District Court for a hearing with regard to the availability to the government of the missing informant.

Respectfully submitted,

HENRY J. BOITEL
Attorney for Petitioner

FRANK SANTO,
Of Counsel.

February, 1974

APPENDIX

APPENDIX A — Opinion of the Court of Appeals

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 444—September Term, 1973.

(Argued November 21, 1973 Decided January 15, 1974.)

Docket No. 73-2314

UNITED STATES OF AMERICA,

Appellee,

—v—

JAMES M. DE ANGELIS,

Appellant.

Before:

LUMBARD, MANSFIELD and MULLIGAN,

Circuit Judges.

Appeal from a judgment of conviction in the Eastern District (Judd, *J.*), entered July 27, 1973, after a jury trial, on a four count indictment charging possession of cocaine with intent to distribute and also distribution of the same in violation of 21 USC sec. 841(a)(1) and 18 USC sec. 2.

Affirmed.

DAVID A. DEPETRIS, Assistant United States Attorney (Robert A. Morse, United States Attorney, Eastern District of New York, and Paul B. Bergman, Assistant United States Attorney, on the brief), *for Appellee.*

HENRY J. BOITEL, New York, New York (Frank Santo, on the brief), *for Appellant.*

APPENDIX A—Opinion of the Court of Appeals

LUMBARD, *Circuit Judge*:

James M. De Angelis appeals from a judgment of conviction in the district court for the Eastern District (Judd, *J.*), entered July 27, 1973, after a jury convicted him on a four count indictment charging possession of cocaine with intent to distribute it and also the subsequent distribution of the same, each on two separate occasions, in violation of 21 USC sec. 841(a)(1) and 18 USC sec. 2. The appellant was sentenced to concurrent terms of imprisonment of five years on each of the four counts, plus a parole term of seven years.

On June 7, 1973, the first day of the trial, a co-defendant, Joseph Matranga, pled guilty to all four counts of the indictment and thereafter testified at trial as a witness for the defense. Matranga was sentenced at the same time as the appellant to concurrent terms of imprisonment of three years on each count, plus a parole term of five years.

In challenging his conviction, the appellant contends: (1) that the government prosecutor made an unwarranted and prejudicial argument to the jury concerning Matranga's credibility; (2) that the trial court abused its discretion by allowing the principal government witness to remain in the courtroom during the trial; (3) that the court also abused its discretion in allowing the government to cross-examine the appellant concerning a prior conviction; (4) that the court's charge to the jury was prejudicial to the appellant; and (5) that it was error for the trial court to have denied the appellant's request for a hearing to inquire into the government's failure to produce a known informant.

We find the appellant's contentions without merit and accordingly affirm the conviction.

APPENDIX A—Opinion of the Court of Appeals

I.

The government's case at trial consisted primarily of the testimony of five agents of the Bureau of Narcotics. The agents' testimony was that on two occasions, April 13, 1972, and May 12, 1972, the appellant and Matranga participated in transactions involving the sale of cocaine to Special Agent Jordison, an undercover agent of the Bureau and the government's principal witness at trial.

Jordison testified that on April 12, 1972, he was introduced to Matranga at the latter's apartment in Brooklyn by an informant, Marilyn Masick. Jordison expressed his interest on that occasion in purchasing cocaine. The sale of an ounce of cocaine for the following day was later arranged between Matranga and Jordison by telephone, the price to be $800. The sale was completed the next afternoon, as agreed upon. According to Jordison, the appellant brought the cocaine to Matranga's apartment shortly after Jordison's arrival, transferred it to Matranga, who sold it in turn to Jordison. The appellant left upon the completion of the transaction, remarking that all was "cool" (i.e. no police undercover activity), that the quality of the merchandise was "good", and that he hoped more business could be done with Jordison in the future. The appellant's automobile and his arrival and departure at Matranga's apartment building were observed and photographed by a surveillance team of narcotics agents.

Jordison kept in touch with Matranga over the ensuing weeks, expressing his continued interest in cocaine. The surveillance of Matranga's apartment building was also maintained. On May 10, 1972, the appellant was again observed and photographed entering and leaving the building. He also drove the same car as in April. The same day Jordison arranged with Matranga by telephone a larger purchase of cocaine, tentatively to take place on the 11th.

APPENDIX A—Opinion of the Court of Appeals

On the evening of the 11th, the appellant was again observed at Matranga's building, but no photographs were taken since it was after dark. Jordison also went to Matranga's apartment, where Matranga showed him an eighth of a kilogram of cocaine, and gave him a sample (later tested to be 60.5% pure). The price was to be $2600. Jordison delayed the purchase until the following day, and was told by Matranga that he would be provided an eighth of a kilogram of like quality. Jordison did not encounter the appellant at Matranga's apartment on the 11th.

On May 12th, Jordison went again to Matranga's apartment. Once again the appellant brought the cocaine after Jordison's arrival. He transferred it to Matranga, who sold it to Jordison, after which Matranga gave a large although unspecified part of the purchase money to the appellant. Again the appellant's arrival and departure in the same car were observed by the surveillance team. The agents also trailed the appellant after he left and photographed him and the car when he stopped at a car wash. The eighth of a kilogram was later tested to be 47.3% pure.

Matranga was subsequently arrested on November 11, 1972, and the appellant on December 11, 1972. The government's reasons for the delay in the arrests were explained to be the hope to unveil further "connections" through Matranga, who had in the meantime changed apartments. As to the appellant, the agents knew him only as "Jimmy" and it was not until his car was later discovered that he was was traced to his mother's home in Brooklyn.

The principal witnesses for the defense were the appellant and Matranga. In regard to the April 13th transaction, they testified that the appellant had come to Matranga's apartment in search of his girlfriend, whom he claimed he often found there. De Angelis denied any use of drugs or any trafficking in them, and specifically denied participation in any sale of cocaine on the 13th.

Matranga's testimony supported this, as did that of Zohira Torres, who was one of two women who had been present in Matranga's apartment at the time.

In regard to the May 12th transaction, De Angelis testified that he was not in Brooklyn at the critical time but was on the way to eastern Long Island in the company of two friends, Art Doran and Anthony Palumbo, both of whom also testified in support of this alibi. Matranga also claimed, despite the disparity in purity percentage that the one-eighth kilogram of cocaine purchased by Jordison on the 12th was the same that he had shown him the previous evening.

Matranga also testified that he had an alternate source of the cocaine sold to Jordison. The source was alleged to be two men, one also named "Jimmy" and the other called "Carlos", with whom he occasionally did business at a bar in Coney Island. Matranga stated that this trafficking on his part was almost entirely to obtain drugs to relieve his sciatic condition.

The appellant also placed in evidence the surveillance photographs which had been taken of him in April and May and which had been turned over to the defense prior to trial. Since no photograph had been taken of the appellant at Matranga's building on May 12th, these photographs presented a scenario consistent with the defense version of the events.

The jury ultimately rejected the defense and found De Angelis guilty on all counts.

II.

A—The Prosecutor's Summation concerning the Coercion of Matranga

During the cross-examination of Matranga, the prosecutor established that Matranga had at one point subsequent to his arrest agreed to cooperate with narcotics agents in leading them to further "connections" in the drug trade, but that he had later backed out of the agreement because his source had threatened him and his family. On re-direct examination, Matranga said that he had been threatened not by "Jimmy" De Angelis but by his alleged source in Coney Island, the "Jimmy" of "Jimmy" and "Carlos".

In summation, the prosecutor reviewed this evidence as follows:

> **And then ladies and gentlemen, Agent Jordison gets a call and Matranga says he can't cooperate because he had been threatened. Now ladies and gentlemen, it is true he was threatened and ladies and gentlemen it is true he was threatened by his source and ladies and gentlemen it is true he was threatened by his source Jimmy, but now he comes in here and testifies that it was a different Jimmy. Ask yourselves why would a man who has plead [sic] guilty to the whole thing, why would he do it? Why? Why would he come in and testify for this man? Ladies and gentlemen he was threatened by this man, James DeAngelis. Matranga was threatened, threatened by this man because this was was afraid Matranga would give him up.**

Despite the fact that he made no objection to this language, or to the prosecutor's questions on cross-examination,[1] the appellant now claims that these remarks were prejudicial to him in that the prosecutor's credibility was thereby placed in conflict with Matranga's before the jury. In support of this contention, the appellant relies on *United States* v. *Puco,* 436 F.2d 761 (2nd Cir., 1971), and *United States* v. *Block,* 88 F.2d 618 (2nd Cir., 1937). We do not find these cases in point.

In both *Puco* and *Block,* through the use of detailed leading questions on cross-examination, the prosecutor was able to place before the jury pretrial incriminating statements of the witness which were not in evidence and which the witness's own testimony on the stand flatly contradicted. Moreover, in each of those cases the witness, unlike Matranga, had denied his complicity in the alleged crime. Also in *Puco* it was to the trial prosecutor that the witness had made the prior inconsistent statement which the prosecutor had then spread before the jury.

Here Matranga had admitted his guilt. He admitted that he and his family had been threatened. And he admitted that the threat came from his source "Jimmy". The prosecutor's summation did no more than recapitulate the witness's own testimony and argue why it was not to be believed. We do not think that his further urging the jury to draw the inference that the source known as "Jimmy" and the appellant were one and the same was improper. It is the accepted and proper purpose of summation to make such arguments regarding the purpose and credi-

[1] During the cross-examination of Matranga by the prosecutor, defense counsel did request the court to caution the jury that the questions posed by counsel were not part of the evidence. This request was promptly granted.

bility of any witness so long as there is sufficient support therefor in the record before the jury. As we find such support here, we conclude that the summation was well within permissible limits.

B—Presence in the Courtroom of Agent Jordison

Agent Jordison was the government's first witness. Thereafter he was permitted to remain at the counsel table over defense objection. The grounds for objection were that the defense intended to elicit contradictory testimony from the other agents to follow on the stand (all members of the surveillance team at Matranga's building) and that Agent Jordison's presence would inhibit such testimony. The appellant relies on the general rule of the sequestration of witnesses, and while he concedes that the matter is one of discretion for the trial court, *United States* v. *Pellegrino*, 470 F.2d 1205 (2nd Cir., 1972), *cert. denied*, 411 U.S. 918 (1973), he claims there was an abuse of discretion here because of the critical nature of Jordison's testimony.

In our opinion, there was no abuse of discretion on the part of the trial court. Jordison was the first witness called. There is no showing that his remaining in the courtroom resulted in any prejudice to the appellant. Here there was far less possibility of prejudice than was present in *Pellegrino*, where the agent whose presence was objected to was the last witness for the prosecution. Even so, we held that the court's ruling in *Pellegrino* was not an abuse of discretion. We similarly hold that on the facts of this case there was no abuse of discretion here.

C—De Angelis's Prior Conviction

Prior to placing De Angelis on the stand, his counsel requested a ruling prohibiting the government from impeaching his credibility by reference to a 1966 New Jersey conviction for transporting and possessing some 2800 cartons of untaxed cigarettes, for which he had been fined $1000. The trial court denied the request. As a consequence the defense was constrained to elicit a summary of the prior conviction from the appellant at the beginning of his testimony. This was further referred to by the prosecution in cross-examination.

The appellant now claims that the court's ruling was an abuse of discretion and prejudicial to him. However, a trial court is required to exclude use of a prior conviction for impeachment only if evidence of such a conviction "negates credibility only slightly but creates a substantial chance of unfair prejudice," *United States* v. *Palumbo,* 401 F.2d 270, 273 (2nd Cir., 1968), *cert. denied,* 394 U.S. 947 (1969). Otherwise the trial court has wide discretion to permit such impeachment testimony, particularly in instances when a prior conviction has involved a crime relating to honesty or integrity. *United States* v. *DiLorenzo,* 429 F.2d 216, 220 (2nd Cir., 1970), *cert. denied,* 402 U.S. 950 (1971); *United States* v. *Palumbo, supra; Gordon* v. *United States,* 383 F.2d 936 (D.C. Cir., 1967).

Here the appellant's prior conviction was neither remote in time from the present offense nor unrelated to his veracity. See *United States* v. *Puco,* 453 F.2d 539 (2nd Cir., 1971). Nor was it so similar to the offense charged that the jury was likely to slip into the belief that the crime alleged was merely a repetition of one previously proven. While some prejudicial effect is bound to result from any testimony regarding a witnesses prior conviction, that effect

here did not so outweigh the probative value of the testimony as to require its exclusion. The offense was relevant and proper for the jury to consider in evaluating the appellant's credibility. Consequently, to permit the testimony was not an abuse of discretion. *United States* v. *Palumbo, supra.*

D—The Trial Court's Charge to the Jury

The appellant contends that the trial court's charge to the jury, through its selection of examples from the testimony to illustrate the nature of the evidence, through some inaccuracies in recapitulation, and through inadvertent bias towards the prosecution, improperly enhanced the government's case. We disagree.

We have reviewed the court's charge "in the context of the whole trial record, particularly the evidence and the arguments of the parties," *United States* v. *Tourine,* 428 F.2d 865, 869 (2nd Cir., 1970), and have found it fair and thorough. What factual errors there were were minor and not prejudicial. The only possibly improper comment by the court, that "it would have been a simpler case if the defendant and Mr. Matranga had been arrested immediately after the sale on April 13 or the sale on May 12," which might have seemed to intimate that the court disbelieved the defense version of how these sales were made, was carefully corrected by the court:

> Ladies and gentlemen of the jury, there may have been one misleading statement that I made. I said the case would have been simpler if the defendants were arrested immediately after the sales on April 13th or May 12th. I didn't mean I am telling you that there was a sale by this defendant at that time. I was simply pointing out the fact that you have to decide the facts on the evidence before you and you

> can consider whether the Government was delinquent in not making an arrest at that time or whether there was an excuse for the delay. . . . [My] comments are not intended to indicate any opinion on my part as to guilt or innocence.

We find no prejudicial error in the charge as corrected.

E—The Missing Informant

Lastly the appellant contends that the failure of the government to make the informant Marilyn Masick available to the defense was a denial of due process requiring at minimum a hearing below on the reasons for her unavailability.

When first mention of the informant arose during the cross-examination of Agent Jordison, defense counsel advised the court that he could probably produce the informant. At a later point defense counsel asked Jordison if he could "produce Marilyn if directed by the Court," to which Jordison replied, "I am not sure." But no request for such a direction was made to the court at that time. Later still, in a colloquy at the bench, defense counsel stated that he "would ask to have her produced." However, when it was clear that defense counsel had as much information available concerning Miss Masick's whereabouts as did the government, the matter of her production at trial was pursued no further, apart from a request by defense counsel for a general charge to the jury on the unavailability of witnesses, which the court granted.

Thus no formal request for a hearing was made at trial, nor any request for an adjournment to provide time to locate Miss Masick, nor any request for the government's help in tracing her. Nor was any showing made of how

her possible testimony would have been useful to the appellant. Furthermore, in spite of the court's suggestion that he do so, appellant's counsel did not call a witness available to him, John Kroll, who the appellant claimed had information regarding Miss Masick's unavailability.

We find there was no denial of due process under these circumstances and that there is no reason to remand the case for a hearing. The informant, contrary to the appellant's claim, was not "an intricate part" of the transactions in question. She was at most a "mere introducer" and never participated in the sales themselves. *United States* v. *Russ,* 362 F.2d 843, 845 (2nd Cir.), *cert. denied,* 385 U.S. 923 (1966). As such her production at trial was not required, nor any hearing into her unavailability, unless the appellant could make a showing of prejudice stemming from her absence. And no such showing has been made out here. Indeed, the only indication of the informant's possible testimony, an unsigned statement made to narcotics agents, suggests that her testimony would have corroborated the government's case.

Furthermore, this was not a case of an unknown informant. The defense knew her identity, but made no showing that any effort had been made to locate her. Under these circumstances, there was no error in the trial court's rulings. *United States* v. *Russ, supra; United States* v. *Coke,* 339 F.2d 183 (2nd Cir., 1964); see *Roviaro* v. *United States,* 353 U.S. 53 (1957).

Affirmed.

MANSFIELD, *Circuit Judge* (Concurring in an Opinion in which Judges Lumbard and Mulligan concur):

I concur completely in every portion of Judge Lumbard's thorough and carefully considered opinion. I would

like to add a few words regarding appellant's attack upon the propriety of the prosecutor's summation.

Recently we have had occasion to take prosecutors to task for improperly asserting their personal knowledge of facts or their personal belief as to the credibility of witnesses. *United States* v. *White*, 486 F.2d 204, 205-07 (2d Cir. 1973); *United States* v. *Bivona*, —— F.2d —— (2d Cir. Nov. 1, 1973), Slip Opin. 253, 256-62; *United States* v. *Santana*, 485 F.2d 365, 370-71 (2d Cir. 1973); *United States* v. *Drummond*, 481 F.2d 62 (2d Cir. 1973); *United States* v. *LaSorsa*, 480 F.2d 522, 526 (2d Cir. 1973), *cert. denied*, 42 U.S.L.W. 3197 (Oct. 9, 1973); *United States* v. *Fernandez*, 480 F.2d 726, 741 n.23 (2d Cir. 1973); *United States* v. *Miller*, 478 F.2d 1315, 1317 (2d Cir. 1973), *cert. denied*, 42 U.S.L.W. 3197 (Oct. 9, 1973); *United States* v. *Pfingst*, 477 F.2d 177 (2d Cir. 1973), *cert. denied*, 41 U.S.L.W. 3645 (June 12, 1973). In at least three of these cases the prosecutor's intemperate remarks were provoked by or responsible to improper statements made by defense counsel in his summation. See *Santana*, *LaSorsa* and *Bivona*, *supra*. Yet aside from deploring such defense tactics, we have had little or nothing to say on the subject. I think that it is high time that steps be taken to insure that defense counsel will observe their duties under the ABA Code of Professional Responsibility (1971), DR 7-106 (C)(3), (4),[1] and refrain from conduct that not only tends

[1] "DR 7-106 (C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

* * * * *

"(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

"(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein."

to goad the prosecutor into possible improprieties but to undermine respect for the administration of justice.

In the present case the prosecutor's summation was clearly within permissible bounds. However, when we look back to the defense counsel's summation which immediately preceded it we find that appellant's counsel repeatedly voiced his personal knowledge of facts and his personal opinion of the credibility of witnesses, in total disregard of the Code.[2] For instance, referring to an attorney-client conference which he apparently had had with appellant before trial he stated:

> "However, James De Angelis didn't come to me and say 'Let them prove me guilty. I didn't do it.' He said 'No, no. I want to tell the truth. I want to take the stand.'; After I heard the story, I went into the facts of the case. . . . I think James De Angelis was an honest witness. . . ." [420]

He continued with several similar statements, including the following:

> "On cross-examination we found out it was there on the 11th and the camouflage about pharmaceutical —well, it threw me for a loop until I found out it was just that it was 100 percent purity. I thought they were talking about different cocaine. . . . [416]; *I am not even a federal agent and I know all those things.* . . . [418];
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> * * * * *
>
> "Only the witnesses you heard for the government, as far as this case goes—I am not interested in the surveillance agents. *I have reports. I have a table of reports.* [420]
>
> * * * * *

[2] Appellant is represented by a different counsel on this appeal.

"After I heard the story I went into the facts of the case and by the way, the only time I knew about this girl Angel was Thursday or Friday because of one of the reports given to me by Mr. De Petris which, by the way, he is required to do and that report gave a description of this girl. It was only in that way that we located this girl and you heard her testimony. You believe her. [423]

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"Again it is a normal procedure for an undercover agent to wear a kel set [microphone and recorder]. I don't care what the government says, use your common sense—

"The Court: Stick to the evidence, Mr. Light.

"Mr. Light: There was some testimony there was no kel set to record the conversations. . . . You're not a witness to it. So, get a recording of what was said and then try to overcome that when your voice is on it. Well, we have nothing like that on April 13. . . . They want you to believe this and don't forget we had not [sic] burden of proving ourselves innocent and *I think we did a pretty good job.* . . . [428-29]

". . . Only when I questioned the agent and I was given the report by Mr. DePetris did I found out about May 11 and that is when you found out about May 11. We never knew that the eighth of a kilo was there on May 11" [430] (emphasis added).

It is ironic that defense counsel, upon such a record, should have the temerity to attack the prosecutor's summation. But more important from the standpoint of administration of jusice is the fact that such conduct on the part of defense counsel seems to be tolerated as the accepted norm in the defense of criminal cases.

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Recently the Chief Justice of the United States and the Chief Judge of this Court have commented upon the necessity for improving the quality of the trial bar, particularly in the defense of criminal cases. See N.Y. Law Journal, Nov. 27, 1973, n. 1, col. 3 (John F. Sonnett Lecture by Chief Justice Warren E. Burger at Fordham Law School); N.Y. Law Journal, Dec. 7, 1973, p. 5, cols. 1-6 (Address by Chief Judge Irving R. Kaufman at Annual Dinner of N.Y. County Lawyers Assn.). An important starting point is to curb improprieties on the part of trial counsel of the type revealed here, which seem to be on the increase. This, of course, will require steps to be taken toward more vigorous enforcement of the Code of Professional Responsibility, more active supervision by trial judges and greater education of the trial bar with respect to its ethical responsibilities.